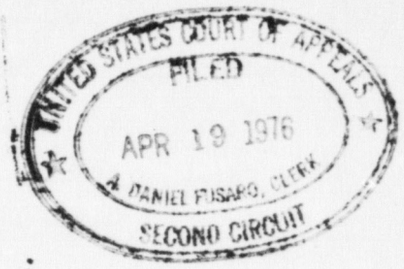
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING



Docket No. 75-7271

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

POLORON PRODUCTS, INC. (with substitution applied for by Dynamark Corporation, assignee),

Plaintiff-Appellant,

-against-

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff-Appellee,

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

B

P/S

PETITION FOR REHEARING

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FOR THE SECOND CIRCUIT

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Coopers & Lybrand ("Lybrand"), the Defendant-Appellee above-named, respectfuly presents its petition for rehearing in the above-entitled cause and, in support thereof, shows as follows:

I.

The Court, in its opinion, determined that the assignment to Dynamark which resulted in the bringing of this appeal was not champertous. This ruling on the issue of champerty conflicts with the decision of the New York State Supreme Court, Special Term Part I, entered on February 26,

1976, in Coopers & Lybrand v. Samuel Levitt, Carl Levitt, Jay Levitt, Dynamark Corporation and George Feiwell, in which the court sustained the complaint of Coopers & Lybrand against a motion, inter alia, to dismiss for failure to state a cause of action. Copies of the complaint in that action and of the order denying the motion to dismiss are annexed hereto as Exhibits A and B, respectively. Lybrand's action, which was commenced on June 3, 1975, alleges claims for fraud, malicious prosecution, champertous assignments and abuse of process, and prima facie tort. One cause of action is based on the assignment to Dynamark, and alleges that the assignment was champertous under § 489 of the New York Judiciary Law and that Lybrand is entitled to damages for such unlawful conduct. (Exhibit A, p. 12.) Although Dynamark and the other defendants moved with supporting affidavits to dismiss this claim, the motion was denied.

With respect to the contention that Dynamark did not purchase the assignment from Poloron for the purpose of "bringing a proceeding" within the meaning of the champerty statute, but simply to bring the present appeal, this argument was expressly made to the New York State Supreme Court and was rejected. The decision of the court is presently on appeal to the New York State Supreme Court, Appellate Division-First Department. The pendency of that appeal, however, does not prevent the decision of the lower court from being res judicata as to the applicability of § 489 of the New York Judiciary Law to the assignment which was purchased by Dynamark so as to bring this appeal. See Goldfarb v.

Wright, 135 F.2d 188, 190-91 (2d Cir. 1943) (A.Hand, J.); U.S. v. Nysco Laboratories, Inc., 215 F. Supp. 87, 89 (E.D.N.Y.), aff'd 318 F.2d 817 (2d Cir. 1963) (per curiam); 1B J. Moore, Federal Practice ¶ 0.416[3] (2d ed. 1974); Id. ¶ 0.405[5]; cf. Bannon v. Bannon, 270 N.Y. 484, 489-91, 1 N.E.2d 975, 977-78 (1936).

It is also respectfully suggested that this Court's decision with respect to the issue of champerty was premised upon certain incorrect factual assumptions.* In its opinion, this Court erroneously stated that the assignment to Dynamark was a "reassignment" to it of its own claim, and opined that Dynamark had been the victim "of an allegedly fraudulent misstatement in connection with a securities sale." It is impossible that Dynamark was a "victim" in the LMC stock sale since (a) Dynamark was not a party to the LMC stock sale -- the only parties were the three Levitts, another shareholder named Jack Whitney, LMC and Poloron (Appendix, pp. 11A, 36A), and (b) Dynamark was not even formed by the Levitts until after the sale had been consummated (Appendix, p. 198A, para. 5). Since Dynamark was not a purchaser or seller of securities, and was not even in existence at the time of the LMC stock sale, it

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* The facts regarding the champerty issue are, of course, entirely dehors the record in this Court. The assignment to Dynamark did not occur until approximately eight weeks after the district court order of dismissal.

cannot possess a claim under Rule 10b-5 except as someone's assignee. Dynamark must therefore be the assignee of a purported claim for injury to the Levitts (the sellers of the stock) or to Poloron (the purchaser of the stock).* In any event, the assignment to Dynamark cannot have been a "reassignment" of "its own claim."

It is also urged that this Court erroneously distinguished Puro v. Puro, 31 App. Div. 2d 837, 298 N.Y.S.2d 111 (1969). Although the facts of that case clearly did present a "reassignment" to the original owner of the claim involved, the court nonetheless stated that the "time-honored public policy of avoiding the enforcement of champertous transactions" could not be so easily brushed aside. The court held that the details of the assignments and the relationship of the parties had to be "exposed under cross-examination" and determined by the trial court. 31 App. Div. 2d at 838, 298 N.Y.S.2d at 112. In the present case, where no such "reassignment" is involved, the champertous nature of the transaction is clear.

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* Since the district court action in Poloron's name is conceded to have been brought upon damage claims assigned to Poloron in 1971, it can be logically presumed that the purported Rule 10b-5 claim involved in this case is for injury to the Levitts.

II.

A major premise of this Court's decision of reversal with respect to the "two-dismissal" provisions of Fed. R. Civ. P. 41(a)(1) was the mistaken belief that the stipulation dismissing the first action against Lybrand specifically stated that dismissal was to be "without prejudice." The stipulation did not in fact contain these words.* The Court, however, stated that their supposed inclusion was significant and should have automatically alerted Lybrand to the planned second suit.

It is submitted that the Court erred in rejecting Lybrand's assertion that it was misled into the dismissal of the first lawsuit. That suit had been pending for more than a year, was fully at issue here in the Southern District of New York, and Poloron, the Levitts and Lybrand were all parties. Poloron then agreed to prosecute the Levitts' claims in its name, but no motive other than harassment or deception can explain why this was not disclosed and accomplished by simple amendment in the pending action. Instead, under a pretense of settlement, the action was dismissed.** Lybrand's attorneys realized that the stipulation had the effect of a dismissal without prejudice, but were led to

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* The stipulation, not printed as part of the Appendix, is annexed as Exhibit A to the Affidavit of Gerald Walpin, Esq., sworn to March 8, 1973 and filed with the District Court on or about March 9, 1973.

** None of the complaints subsequently filed against Lybrand in Poloron's name disclosed the existence of the assignment to Poloron or the true nature of the claims sued upon.

believe that, absent some breach of the settlement or other unforeseen development, litigation against Lybrand was at an end. If they had been truthfully told that the "settlement" made another suit in a distant forum an absolute certainty, they obviously would not have agreed to the dismissal.

III.

Although this Court recognized that the "two-dismissal" bar of Rule Fed. R. Civ. P. 41(a)(1) by its terms makes no distinction between a prior dismissal by notice and one by stipulation, the Court concluded that a distinction should be made. The Court reasoned that the purpose of the two-dismissal rule would not be served by a literal application because the effect would be to "close the courthouse doors to an otherwise proper litigant." It is respectfully suggested that the Court erred in this concern. There is no reason why the two-dismissal rule should be "viewed with a hostile eye." 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2368, at 187 (1971). A plaintiff who has voluntarily dismissed a first suit by stipulation and desires voluntarily to dismiss yet a second suit without prejudice, may do so by simple motion to the court under Fed. R. Civ. P. 41(a)(2), which expressly provides for such a dismissal "upon such terms and conditions as the court deems proper." It is respectfully suggested that the Court overlooked Rule 41(a)(2) in finding it necessary to read into the "two-dismissal" provision

a distinction inconsistent with its terms. No sufficient reason exists to impose a special gloss upon Rule 41(a)(1) so as to preserve a plaintiff's right to a third suit on the same claim. A plaintiff desiring to preserve that right is amply and justly provided with a vehicle therefor by Rule 41(a)(2).

IV.

Affirmance of the judgment of the district court is directly called for by the decision of the Supreme Court of the United States in Ernst & Ernst v. Hochfelder, 44 U.S.L.W. 4451, decided on March 30, 1976. The Court there held that a private cause of action for damages does not lie under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant. Because the plaintiff there had specifically disclaimed any allegation of fraud or intentional misconduct on the part of the defendant accounting firm, the Court found it unnecessary to remand the action for further proceedings and the claim against the accountants was dismissed. 44 U.S.L.W. at 4460.

The same result should apply here. As in Ernst & Ernst v. Hochfelder, there is a specific disclaimer in this case of any allegation that Lybrand engaged in fraud or intentional misconduct in connection with the LMC stock sale. In an affidavit filed with the district court (Appendix, pp. 173A-174A), Mr. George

Feiwell, the long-time attorney for the Levitts, Dynamark and Poloron, states:

> "These statutory and regulatory provisions [§ 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder] speak unambiguously of fraud; but, in my opinion, at the time said complaints [against Lybrand] were prepared and at present, said statutory and regulatory provisions apply to negligent and careless conduct of an auditor in connection with the purchase and sale of securities, so as to constitute constructive fraud under said law and Rule. * * * In drafting the foregoing pleading counsel relied on this authority. No charge of common law fraud and deliberate deception was intended; * * *." (Emphasis added.)

Contrary to Mr. Feiwell's assertion, Ernst & Ernst v. Hochfelder makes it unequivocally clear that § 10(b) and Rule 10b-5 do not apply to negligent and careless conduct of an auditor. Indeed, it may be noted that the charge against Ernst & Ernst of "inexcusable negligence," 44 U.S.L.W. at 4453 n. 5, held insufficient by the Supreme Court, was somewhat stronger than the claim against Lybrand here.

This Court's opinion stated that it preferred to remand the present case for the district court to consider the sufficiency of the amended complaint against Lybrand. In light of the Supreme Court decision in Ernst & Ernst v. Hochfelder, it is respectfully urged that no purpose would be served by remanding the action for further proceedings.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and

that, upon further consideration, (a) the appeal herein be dismissed or, if not dismissed, (b) that the judgment of the district court be affirmed or, if not affirmed, (c) that the matter be remanded to the district court to determine (i) the facts necessary to resolve the issue of champerty and/or (ii) whether Lybrand was misled into executing the stipulation which resulted in the dismissal of the first action against it.

Dated: New York, New York
April 19, 1976

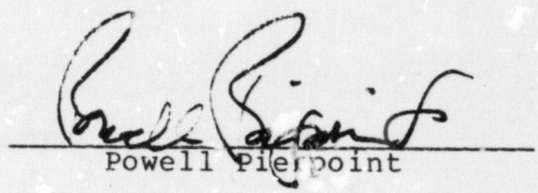
Respectfully submitted,

HUGHES HUBBARD & REED
Attorneys for Defendant-Appellee
One Wall Street
New York, New York 10005
(212) WH3-6500

Of Counsel:
Powell Pierpoint
William M. Barron

Certificate of Counsel

I, Powell Pierpoint, attorney for Defendant-Appellee, Coopers & Lybrand, do hereby certify that the foregoing petition for a renearing of this cause is presented in good faith and not for purpose of delay.



Powell Pierpoint

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

COOPERS & LYBRAND, a Partnership, :

Plaintiff, : Index No. 11706/75

- against - :

COMPLAINT

SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION AND GEORGE FEIWELL, :

Defendants. :

- x

Plaintiff, Coopers & Lybrand ("Lybrand"), for its complaint alleges upon information and belief:

1. Lybrand is a partnership of certified public accountants organized under the laws of the State of New York and maintains offices at, among other places, 1251 Avenue of the Americas, New York, New York.

2. At all times pertinent hereto up to and including December 1, 1967, defendant Samuel Levitt was the principal stockholder and president of Levitt Manufacturing Corporation ("LMC"), a New York corporation having its principal place of business in the State of Indiana.

3. At all times pertinent hereto up to and including December 1, 1967, defendant Carl Levitt was a major stockholder and secretary-treasurer of LMC, in charge of its financial and bookkeeping operations.

4. At all times pertinent hereto up to and including December 1, 1967, defendant Jay Levitt was a major stockholder and vice-president of LMC.

5. Defendant Dynamark Corporation is an Illinois corporation which is, and at all times pertinent hereto was, wholly owned and controlled by defendants Samuel Levitt, Carl Levitt and Jay Levitt.

6. Defendant George Feiwell is an Illinois attorney who, at all times pertinent hereto, (i) up to and including December 1, 1967 was general counsel to and acted as agent for LMC; (ii) has represented and acted as agent for defendants Samuel, Carl and Jay Levitt and Dynamark Corporation; (iii) has represented and acted as agent for defendants Samuel, Carl and Jay Levitt and Dynamark Corporation with respect to the assertion of the false and groundless claims against Lybrand hereinafter set forth.

7. The causes of action asserted by Lybrand herein arise out of the commission of wrongful and tortious acts by the defendants in the State of New York.

FIRST CAUSE OF ACTION

8. Lybrand repeats and realleges each and every allegation contained in paragraphs 1 through 7 above as though here set forth in full.

9. In October, 1967 defendants Samuel Levitt, Carl Levitt, Jay Levitt (the "Levitts") and one Jack Whitney, the

owners of all of the issued and outstanding stock of LMC, entered into a written agreement (the "Purchase Agreement") with Poloron Products, Inc. ("Poloron"), a New York corporation having its principal place of business in the State of New York. By the terms of the Purchase Agreement Poloron agreed to acquire all of said LMC stock in exchange for $11,200 in cash plus a contingent future amount of Poloron stock depending on the pre-tax earnings, if any, of LMC during the following three years. The Levitts agreed to produce a balance sheet of LMC as of September 30, 1967, audited by Lybrand.

10. Lybrand's only role was to examine the balance sheet. A handwritten draft of a tentative balance sheet of LMC as of September 30, 1967 (the "Tentative Balance Sheet") was presented to the parties on December 1, 1967, the closing date for the Purchase Agreement. Lybrand did not render any report until more than two months later. At the closing, the Levitts warranted to Poloron that the Tentative Balance Sheet was accurate and agreed to indemnify Poloron for any liabilities or claims against LMC not reflected therein.

11. While negotiating with Poloron, the Levitts knew that LMC was in a very weak financial position and that bankruptcy was imminent. The Levitts devised a scheme and conspiracy to deceive and defraud Lybrand in its examination of the LMC balance sheet and also to deceive and defraud Poloron.

12. In pursuit of their scheme and conspiracy the

Levitts withheld from Lybrand vital information with respect to the liabilities and assets of LMC, including, inter alia, all references to certain creditors of LMC, with the full knowledge and expectation that Lybrand was relying and would rely upon the financial and transactional information and documentation which was provided to it, and Lybrand did so rely.

13. As a direct result of the Levitts' scheme and conspiracy, the Tentative Balance Sheet described in paragraph 10 above understated the liabilities and overstated the assets and balance sheet net worth of LMC.

14. Further in pursuit of their conspiracy and scheme,

(a) At the closing of the Purchase Agreement on December 1, 1967, the Levitts misrepresented to Poloron that the Tentative Balance Sheet accurately stated the liabilities and assets of LMC, thereby inducing Poloron to consummate the Purchase Agreement; and

(b) on or about February 9, 1968, after the Purchase Agreement had been consummated, defendant Carl Levitt falsely certified to Lybrand that LMC had no liabilities other than those contained in the Tentative Balance Sheet. Said certification was received by Lybrand on February 9, 1968, and in reliance thereon Lybrand issued its report.

15. The fraudulent actions of the Levitts set forth above were intended to and did result in a false record of the assets and liabilities of LMC upon which Poloron relied in consummating the Purchase Agreement on December 1, 1967, and which Lybrand was induced to partially certify on February 9, 1968.

16. As hereinafter set forth, the Levitts' conspiracy, which resulted in the false record described above, was an essential part of a scheme pursuant to which (a) they disposed of their interest in LMC to Poloron and received a lucrative sales representative agreement to sell LMC's products, (b) they avoided at least part of the impact upon them of their indemnity obligation to Poloron described in paragraph 10 above, and (c) they used said false record of assets and liabilities as a basis for making groundless claims against Lybrand.

17. In 1968, 1969 and 1970 Poloron discovered certain undisclosed liabilities, overstatements of accounts receivable and understatements of accounts payable as of September 30, 1967 which reduced the balance sheet net worth of LMC by several hundred thousand dollars. Poloron accordingly compensated itself (a) by withholding all of the shares of Poloron common stock which were due the Levitts and (b) by causing LMC to withhold a portion of the sales commissions which were due under the sales representative agreement which the Levitts had obtained from LMC and had assigned to Dynamark Corporation.

18. In 1970 the Levitts and Dynamark, represented by defendant Feiwell, commenced an action in the United States District Court for the Northern District of Indiana, seeking to recover the Poloron common stock and sales commissions which had been withheld from them.

19. Feiwell then knew or should have known of the scheme and conspiracy of the Levitts and Dynamark hereinabove set forth, and, in accordance with said scheme and as a co-conspirator therein, shortly before trial filed an amended complaint which named Lybrand as a defendant.

20. Soon thereafter, the action was transferred to the United States District Court for the Southern District of New York and a further amended complaint was filed.

21. In the claim against Lybrand, the Levitts and Dynamark falsely alleged that the balance sheet of LMC delivered at the closing on December 1, 1967 had been certified by Lybrand; that the Levitts had relied on this balance sheet of their own company in selling their stock to Poloron; that the allegedly certified balance sheet had been part of a scheme by Lybrand to defraud the Levitts; and that it had operated as a fraud and deceit upon them.

22. After a period of litigation, the Levitts, Dynamark and Poloron entered into a secret agreement.

23. Aided and abetted by Feiwell, the Levitts and Dynamark assigned their pending claim against Lybrand to Poloron. Said assignment to Poloron was made with the intent and for the sole purpose of enabling Poloron to sue Lybrand on the purported claim, and was unlawful and champertous. The Levitts and Dynamark also exacted from Poloron its agreement, inter alia, (a) that the action then pending against Lybrand in New York would be dismissed, (b) that Poloron, acting on behalf of the Levitts and Dynamark, would retain Feiwell to promptly file a new suit against Lybrand on the same claim, and (c) that 75% of any recovery against Lybrand would belong to the Levitts and Dynamark. Poloron further stipulated that no attorney other than Feiwell would be retained for the litigation against Lybrand without the consent of the Levitts and Dynamark and also agreed that it would assign the claim against Lybrand back to Dynamark upon demand.

24. As an inducement to Poloron, the Levitts and Dynamark agreed to pay 75% of Poloron's future litigation costs and agreed to pay for 75% of any judgment which Lybrand might obtain against Poloron by way of counterclaim.

25. The Levitts, Dynamark and Feiwell did not disclose the above described agreement to Lybrand. Instead, it was represented to Lybrand that they had reached a settlement with Poloron and wished to terminate the litigation. Lybrand's counsel was asked to join in a stipulation of discontinuance, and did so. Lybrand was not informed that a second action against it on the same claim was planned.

Feiwell, the long-time attorney for the Levitts, Dynamark and Poloron, states:

> "These statutory and regulatory provisions [§ 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder] speak unambiguously of fraud; but, in my opinion, at the time said complaints [against Lybrand] were prepared and at present, said statutory and regulatory provisions apply to negligent and careless conduct of an auditor in connection with the purchase and sale of securities, so as to constitute constructive fraud under said law and Rule. * * * In drafting the foregoing pleading counsel relied on this authority. No charge of common law fraud and deliberate deception was intended; * * *." (Emphasis added.)

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Respectfully submitted,

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Attorneys for Defendant-Appellee
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(212) WH3-6500

Of Counsel:
Powell Pierpoint
William M. Barron

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- against - :

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22. After a period of litigation, the Levitts, Dynamark and Poloron entered into a secret agreement.

23. Aided and abetted by Feiwell, the Levitts and Dynamark assigned their pending claim against Lybrand to Poloron. Said assignment to Poloron was made with the intent and for the sole purpose of enabling Poloron to sue Lybrand on the purported claim, and was unlawful and champertous. The Levitts and Dynamark also exacted from Poloron its agreement, inter alia, (a) that the action then pending against Lybrand in New York would be dismissed, (b) that Poloron, acting on behalf of the Levitts and Dynamark, would retain Feiwell to promptly file a new suit against Lybrand on the same claim, and (c) that 75% of any recovery against Lybrand would belong to the Levitts and Dynamark. Poloron further stipulated that no attorney other than Feiwell would be retained for the litigation against Lybrand without the consent of the Levitts and Dynamark and also agreed that it would assign the claim against Lybrand back to Dynamark upon demand.

24. As an inducement to Poloron, the Levitts and Dynamark agreed to pay 75% of Poloron's future litigation costs and agreed to pay for 75% of any judgment which Lybrand might obtain against Poloron by way of counterclaim.

25. The Levitts, Dynamark and Feiwell did not disclose the above described agreement to Lybrand. Instead, it was represented to Lybrand that they had reached a settlement with Poloron and wished to terminate the litigation. Lybrand's counsel was asked to join in a stipulation of discontinuance, and did so. Lybrand was not informed that a second action against it on the same claim was planned.

26. In further pursuit of the scheme and conspiracy, Feiwell thereafter instituted the promised suit against Lybrand in Poloron's name in the United States District Court for the Northern District of Illinois. The complaint contained the same false allegations as those made in the first action. The complaint, however, did not disclose the existence of the assignment described above, nor did it disclose that the action was being brought by Poloron on behalf of, and for the benefit of, the Levitts and Dynamark.

27. Lybrand engaged counsel in Illinois and otherwise prepared to defend this second action, but Feiwell soon thereafter dismissed the action by filing a notice of dismissal. Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, said dismissal constituted an adjudication on the merits with respect to the purported claim against Lybrand.

28. In September 1972 Feiwell, again in Poloron's name, instituted a third suit against Lybrand on the same claim in the United States District Court for the Southern District of New York. The complaint again made the false allegations against Lybrand described above. In the course of this third action, the secret agreement of the Levitts and Dynamark came to light. Lybrand, by third-party complaint, asserted claims for malicious prosecution and fraud against the Levitts, Dynamark Corporation and Feiwell.

29. On April 3, 1975 the United States District Court for the Southern District of New York dismissed the suit against Lybrand. The court held that, as set forth in paragraph 27 above, the dismissal of the second action against Lybrand had constituted an adjudication on the merits in Lybrand's favor.

30. Poloron decided not to appeal from the dismissal order of the United States District Court. Nonetheless, counsel for Dynamark and the Levitts filed a notice of appeal in Poloron's name and Dynamark, acting through its officers and agents the Levitts and Feiwell, demanded and received from Poloron what purported to be an assignment of the claim against Lybrand. Dynamark demanded and received said assignment with the intent and for the purpose of acquiring the right to prosecute the claim against Lybrand itself. Said attempted assignment to Dynamark was unlawful and champertous.

31. By virtue of the fraud perpetrated upon Lybrand and Poloron, and as a direct consequence thereof, Lybrand has been compelled to defend against three baseless law suits and succession, resulting in damage to it as follows:

(a) Substantial time of executives and other personnel of Lybrand has been and will be lost, rather than profitably utilized in the operations of Lybrand; and

(b) Substantial attorneys' fees and other expenses have been and will be incurred by Lybrand.

WHEREFORE, Lybrand demands judgment against defendants Samuel Levitt, Jay Levitt, Carl Levitt, Dynamark Corporation and George Feiwell, jointly and severally, for (a) actual damages in the sum of not less than $125,000, together with interest thereon, (b) exemplary damages in the sum of $1,000,000, (c) the costs and disbursements of this action and (d) such other and further relief as is just and proper.

SECOND CAUSE OF ACTION

32. Lybrand repeats and realleges each and every allegation contained in paragraphs 1 through 7 and 9 through 30 above as though here set forth in full.

33. The Levitts, Dynamark and Feiwell, maliciously and without probable cause, have prosecuted or caused to be prosecuted three successive law suits against Lybrand on the same claim, involving four forums and five deceitful complaints, resulting in damage to Lybrand as follows:

(a) Substantial time of executives and other personnel of Lybrand has been and will be lost, rather than profitably utilized in the operations of Lybrand; and

(b) Substantial attorneys' fees and other expenses have been and will be incurred by Lybrand.

WHEREFORE, Lybrand demands judgment against defendants Samuel Levitt, Jay Levitt, Carl Levitt, Dynamark Corporation and George Feiwell, jointly and severally, for (a) actual damages

in the sum of not less than $125,000, together with interest thereon, (b) exemplary damages in the sum of $1,000,000, (c) the costs and disbursements of this action and (d) such other and further relief as is just and proper.

THIRD CAUSE OF ACTION

34. Lybrand rep ats and realleges each and every allegation contained in paragraphs 1 through 7 and 9 through 30 above as though here set forth in full.

35. The assignment to Poloron of the Levitts' and Dynamark's purported claim against Lybrand, as set forth in paragraph 23 above, was champertous and unlawful, in violation of, inter alia, Section 489 of the New York Judiciary Law.

36. As a direct result of said unlawful assignment, Lybrand was compelled to defend against two successive law suits as set forth in paragraphs 26 through 29 above, resulting in damage to it as follows:

(a) Substantial time of executives and other personnel of Lybrand has been lost, rather than profitably utilized in the operations of Lybrand; and

(b) Substantial attorneys' fees and other expenses were incurred by Lybrand.

WHEREFORE, Lybrand demands judgment against defendants Samuel Levitt, Jay Levitt, Carl Levitt, Dynamark Corporation

and George Feiwell, jointly and severally, for (a) actual damages in the sum of $109,000, together with interest thereon, (b) exemplary damages in the sum of $500,000, (c) the costs and disbursements of this action and (d) such other and further relief as is just and proper.

FOURTH CAUSE OF ACTION

37. Lybrand repeats and realleges each and every allegation contained in paragraphs 1 through 7 and 9 through 30 above as though here set forth in full.

38. The assignment to Dynamark Corporation of the purported claim against Lybrand, as set forth in paragraph 30 above, was champertous and unlawful, in violation of, inter alia, Section 489 of the New York Judiciary Law.

39. As a direct result of said unlawful assignment to Dynamark Corporation, Lybrand has been compelled to defend against an appellate proceeding commenced by Dynamark in the United States Court of Appeals for the Second Circuit, and has incurred substantial attorneys' fees and other expenses in excess of $4,000 to date.

WHEREFORE, Lybrand demands judgment against Dynamark Corporation, Samuel Levitt, Jay Levitt, Carl Levitt and George Feiwell, jointly and severally, for (a) actual damages in the sum of not less than $4,000, together with interest thereon,

(b) exemplary damages in the sum of $500,000, (c) the costs and disbursements of this action and (d) such other and further relief as is just and proper.

FIFTH CAUSE OF ACTION

40. Lybrand repeats and realleges each and every allegation contained in paragraphs 1 through 7 and 9 through 30 above as though here set forth in full.

41. The wrongful acts of the Levitts, Dynamark and Feiwell hereinabove set forth constitute a prima facie tort, resulting in damage to Lybrand as follows:

(a) Substantial time of executives and other personnel of Lybrand has been and will be lost, rather than profitably utilized in the operations of Lybrand; and

(b) Substantial attorneys' fees and other expenses have been and will be incurred by Lybrand.

WHEREFORE, Lybrand demands judgment against defendants Samuel Levitt, Jay Levitt, Carl Levitt, Dynamark Corporation and George Feiwell, jointly and severally, for (a) actual damages in the sum of not less than $125,000, together with interest thereon, (b) exemplary damages in the sum of $1,000,000, (c) the costs and disbursements of this action and (d) such other and further relief as is just and proper.

HUGHES HUBBARD & REED

By _____
Attorneys for Plaintiff
One Wall Street
New York, New York 10005
(212) WH 3-6500

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. THOMAS J. HUGHES Justice.

COOPERS & LYBRAND

— against —

SAMUEL LEVITT, et al.

MINUTE BOOK SPECIAL TERM PART I N.Y. LAW JO

FEB 25 1976

RECEIVED DISP'N BOOK

The following papers numbered 1 to ..... read on this motion, submitted

No. 35 on Calendar of JAN 7 1976

	PAPERS NUMBERED
Notice of Motion ~~Order to Show Cause~~ and Affidavits Annexed	1 - 5
Answering Affidavit & Exhibit	6 - 7
Replying Affidavit	8
Affidavit	
Affidavit	
Pleadings — Exhibit	
Stipulation — Referee's Report — Minutes	
Filed Papers	

FILED FEB 26 1976 NEW CO. CLER

Upon the foregoing papers this This is a motion by defendants to dismiss the complaint. The Court has examined the various grounds urged by defendants, including failure of the complaint on its face to state a cause of action; statute of limitations; res judicata and collateral estoppel; release of a joint tort feasor, thus releasing all tort feasors under Illinois law; lack of personal jurisdiction; and pendency of another action. Assuming, as it must, the truth of the allegations in the complaint, the Court is constrained to deny the application.

Dated 2/24/76

T. J. H. J.S.C.

Briefs: Plaintiff's X Defendant's XX Petitioner's ____ Respondent's ____ Relator's ____

Briefs ____

County Clerk's No. 11706, 19 75

Spec I Liber C-199 Line 3, 19 75

Exhibit B

COPY RECEIVED 3:45 PM

April 9, 1976

GOLD, FARRELL & MARKS

BY J Weder